DBA Butler Pty Ltd Lawyers
ABN 85 078 086 647

NEWS

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This edition of DBA News includes:

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Trustee liability

The recent South Australian Supreme Court case of *Hanel v O'Neil* [2003] SASC 409 is causing uncertainty in relation to a very basic asset protection strategy.

The court held that a director was personally liable for debts incurred by the corporate trustee of a family trust even though the trustee was covered by a right of indemnity against the trust's assets.

A director of a corporate trustee would generally only be personally liable if the corporate trustee had no right of indemnity or was acting outside the terms of the trust deed.

However, having regard to s 197(1) of the *Corporations Act 2001* (Cth) the court held that the director was personally liable for outstanding lease payments and costs owing on early departure from leased premises.

A 2:1 majority of the Supreme Court concluded that a right of indemnity was not sufficient to protect the director from personal liability under s 197(1) when the trust fund has insufficient assets.

Section 197(1) states: 'A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or part of the liability if the corporation:

- has not, and cannot, discharge the liability or that part of it; and
- is not entitled to be fully indemnified against the liability out of trust assets.

This is so even if the trust does not have enough assets to indemnify the trustee.'

This decision means that a director of a corporate trustee could have their personal assets exposed if the trustee is sued. In particular, directors need to carefully consider the most appropriate structure to operate a business or hold investments. A company could be more robust than a trust with a corporate trustee depending on how the shares in the company are structured.

Note that the above decision is likely to be followed by the courts of other jurisdictions.

It may come as no surprise to learn that the issue that was at the heart of this case appears to be poor legislative drafting.

The former s 233(2) provided that directors of a corporate trustee who had a right of indemnity could not be held personally liable for a trust even if the trust had insufficient assets to pay its liabilities.

Note: this case is on appeal and we will keep you posted on any developments. There is also pressure for the legislation to be amended.

Daniel Butler/John Sudano

New SMSF members

New disclosure rules apply to SMSFs due to recent changes to the *Corporations Act 2001* (Cth). There are now a number of extra steps to complete prior to admitting a new member to an existing SMSF.

These include providing a membership application form together with a product disclosure statement ('PDS') for the fund. These documents must be given to the person before being admitted as a member of the fund.

As you are aware, a new member must also be admitted as a trustee before commencing membership in an existing fund. This gives rise to further documentation. If the fund has individual trustees, a deed of change of trustee is usually required. However, if the fund has a corporate trustee then the new member must be admitted as a director. In addition, ATO notification is required.

Failure to properly document the above changes can result in rendering the fund non-complying and significant penalties. DBA offers an admission of member package and a change of trustee package to document these changes.

John Sudano

Bankruptcy & Super

Bankruptcy trustees now have more power to recover super contributions.

The new powers were announced on 16 December 2003 following concerns arising from the High Court's decision in *Cook v Benson* [2003] HCA 36.

This case examined the issue of whether roll-overs from one super fund to three others could be clawed back by the trustee in bankruptcy. The High Court held that they could not be clawed back; as the roll-overs were for full valuable consideration.

Changes are being made to the *Bankruptcy Act 1966* (Cth) to clarify the existing powers of a trustee in bankruptcy to set aside certain transactions and to include a specific power to recover personal contributions above $5,000 p.a. made from after-tax money.

The changes will not affect employer-funded super contributions. Note that although the changes are still to be finalised as law, they will apply from 16 December 2003.

Personal contributions to super funds after this date are now more likely to be clawed back. Until more details of the proposed amendments are available:

- trustees receiving significant personal contributions should obtain evidence of the contributing member's solvency;
- such contributions will be more vulnerable if made to a SMSF, rather than an arm's length fund;
- people should think twice before rolling over from one fund to another; and
- be mindful that claw-back provisions may extend indefinitely.

The draft legislation was introduced into Parliament on 24 March 2004. We will be presenting an update at the next DBA Network Worjshop on 21 May 2004.

Ian Waters

Forthcoming Seminar

The *DBA Network* will be holding a ½ day workshop at the Savoy Hotel, Melbourne on the morning of **21 May 2004** covering reserving in SMSFs, SMSFs holding property jointly and estate planning.

Proposed Super Rules

The Treasurer's announcements in late February, 2004 included the following proposals:

From 1 July 2004

- permit people aged 18 to 64 (inclusive) to contribute to a super fund without being gainfully employed.
- funds must commence paying benefits to persons over age 75. This will require many people who are still accumulating to start their benefit at 75.

From 20 September 2004

- recognise growth, or investment linked pensions as complying pensions ('CP'). Pensioners will be required to draw down a set proportion of their account balance each year based on their life expectancy. The growth pension will be subject to the pension RBL. Commutations will be similar to the fixed term or life expectancy CP.
- reduce from 100% to 50% the assets test exemption for CPs. Many will try to take an asset test exempt ('ATE') pension prior to this change. We query whether any subsequent roll-over will jeopardise the 100% exemption. Growth pensions will also be eligible for 50% ATE.

From 1 July 2005

- permit people who have reached their preservation age (ie, 55 to 60 years) to draw down all or part of their super benefit as a non-commutable income stream without resigning from their current employer.

While the legislation may not be finalised prior to the proposed 2004 start dates, you may wish to notify clients who will be impacted by the new rules soon. We will keep you posted on progress.

Daniel Butler

For further Information please contact:

DBA BUTLER PTY LTD, Lawyers, 23 Union Street, South Melbourne Vic 3205
Ph 03 9682 0903 Fax 03 9682 0907 dba@dbabutler.com www.dbabutler.com

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